IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDCITION

WRIT PETITION NO. 1277 OF 2005

1. Hotel Horizon Pvt. Ltd.)
a Company incorporated under)
the Companies Act, 1956,)
having its Office at 37,)
Juhu Beach, Mumbai 400 049)
)
2. Mr. Sagar H. Sharma,)
a citizen of India and a Director)
of Hotel Horizon Pvt. Ltd.)
)
3. Mr. Vishal H. Sharma)
a citizen of India and a Director)
of Hotel Horizon Pvt. Ltd.,)
residing at Vidya Apartment, 14th)
floor, Off C. Loyalka Marg,)
Chowpatty, Bandstand,)
Mumbai - 400 006.) ....Petitioners.

Versus

1. Union of India,)
)
2. The Regional Provident Fund)
Commissioner.)

)

3. The Assistant Commissioner &)
Recovery Officer, Employees')
Provident Fund, having office at)
841 Bhavishyanidhi Bhavan,)
Bandra (East), Mumbai - 400051) .....Respondents.

Mr. R.S. Pai with Mrs. S. Deshpande i/b M/s. Haresh Mehta & Co. for the Petitioners.

Ms. S. V. Bharucha for the Respondents.

CORAM: V.M. KANADE, J.
DATE : 23rd April, 2007

ORAL JUDGMENT:

1. Petitioners by this Petition take exception to the order passed by the Assistant Provident Fund Commissioner and Recovery Officer dated 03/03/2005 whereby he was pleased to direct the Petitioners to pay an amount of Rs 6,26,193.55 towards the liability of the Petitioners for payment of interest on account of delayed remittances.

FACTS:

2. Brief facts which are relevant for the purpose of deciding this Petition are as under :-

3. Petitioner No.1 is a Company incorporated under the Companies Act and the 2nd and 3rd Petitioners are Directors of the said Company. Petitioner - Company had employed about 72 workmen in its hotel at Juhu. It is the case of the Petitioners that in June 1999 the workmen went on strike and, as a result, the business of the Petitioners came to a stand-still and business operations of the Petitioner - Company were completely paralyzed. It is the case of the Petitioners that though Petitioner Nos. 2 and 3 are the Directors of the said Company, they do not fall within the definition of the term “employer” as defined under the provisions of the Employees’ Provident Fund & Miscellaneous Provisions Act, 1952 (For short “EPF Act”).

4. The Employees’ Provident Fund Commissioner, who is a statutory authority under the provisions of the said EPF Act, initiated proceedings under section 7A of the EPF Act with regard to the provident fund claims for the periods from 01/01/1996 to August, 1997, September, 1997 to December,

1998 and January, 1999 to May, 1999. The 2nd Respondent passed an order under section 7A of the EPF Act dated 06/03/1998 and determined the provident fund dues under section 7A alongwith interest under section 7Q of the said Act for the aforesaid period as an amount payable by the Petitioners which was calculated and determined by him as Rs 2,76,724/-. Thereafter, another order was passed for the period from September, 1997 to December, 1998 dated 29/03/1999 in which it was held that the amount payable by the Petitioners was Rs 8,77,009/-. Thereafter, in respect of third period commencing from January, 1999 to May, 1999 he determined the provident fund dues payable by the Petitioners as Rs 3,54,767/-. The total provident fund dues, therefore, came to Rs. 15,08,500/- for the aforesaid three periods. A request was made by the Petitioners to the 2nd Respondent requesting him that the Petitioners may be permitted to pay the amount in installments. Accordingly, the Petitioners were permitted to pay the said amount in 36 installments. It is the case of the Respondents that the undertaking was given by the Petitioners that they would be paying this amount in time without committing any default.

It is the case of the Petitioners that the entire amount which was due and payable was paid in installments by the Petitioners as permitted by the Central Provident Fund Commissioner.

5. According to the Petitioners, after scrutinizing the total payments which were made, they realized that they made an excess payment of Rs 86,009/- and, therefore, a letter was written to the Respondents requesting them to refund the excess amount.

6. Thereafter, 2rd Respondent issued a fresh show cause notice dated 22/12/2004 claiming an amount of Rs 6 lakhs which was purported to be payable towards interest which was charged under section 7Q of the EPF Act. Petitioners informed the Respondents that the provident fund dues which were payable to the Respondents as per the order passed under section 7A and according to the Recovery Certificate which was issued by the Respondents had been paid by the Company by the end of December, 2002 and, therefore, no further dues were payable by the Company. It

was also contended that the 3rd Respondent was not competent to direct interest under section 8B of the EPF Act and that interest under section 7Q could be levied only by the authority exercising power under section 7A of the EPF Act at the time of adjudication and not by the Recovery Officer who exercises power on the basis of Recovery Certificate issued to him under section 8B of the said Act. The 2nd Respondent, however, in his reply has stated that he was authorized to charge interest under section 7Q of the said Act though such interest was not mentioned in the Recovery Certificate issued by the 3rd Respondent.

7. The show cause notice issued by the 2nd Respondent dated 22/12/2004 directed the Petitioner Nos.2 & 3 to appear personally before him on 07/01/2005 to pay the said amount. The show cause notice also stated that on failure to pay the amount, the Petitioner Nos. 2 and 3 were liable to be arrested.

8. Petitioners, having apprehension that they are going to be arrested on account of the show cause notice, filed Writ

Petition in this Court being Writ Petition No. 12 of 2005. This Court by order dated 13/01/2005 directed the 3rd Respondent to hear the Petitioners and pass appropriate orders pursuant to the show cause notice and further directed the 3rd Respondent not to arrest the Petitioners. Thereafter, the impugned order was passed dated 03/03/2005 in which it was held by the 3rd Respondent that though he was acting as a Recovery Officer under section 8B of the EPF Act, he had power under section 7Q of the EPF Act to impose interest in respect of delay in making provident fund installments by the Petitioners. He also held that the judgment on which reliance was placed by the Petitioners in the case of Indian Drilling and Mining Pvt. Ltd. & Anr. Vs. RPFC, reported in 2001(2) LLN 306 passed by the Hon'ble Calcutta High Court was not binding on him. Petitioners have, therefore, challenged the aforesaid order.

SUBMISSIONS:

9. Mr. Pai, the learned Counsel appearing on behalf of the Petitioners submitted that the 3rd Respondent is a Recovery

Officer as defined under the provisions of the said Act and, as such, was not authorized to charge interest under section 7Q but was only authorized to recover the amount which was determined under section 8B of the EPF Act. He submitted that entire dues which were determined under section 8B of the EPF Act had already been paid. He submitted that the 3rd Respondent could not act as an "authorized officer" as defined under section 2(aa) of EPF Act and that the 3rd Respondent could not act as an authorized officer while performing functions of the Recovery Officer under section 8B of the said Act. He submitted that the judgment of the Calcutta High Court in the case of Drilling and Mining Pvt. Ltd (supra) was binding on the authority and, therefore, the impugned order was liable to be set aside. He invited my attention to the definition of "Recovery Officer" and "authorized officer" as defined under the said Act. He invited my attention to the provisions of section 8B and 8G of the said Act. He further submitted that the 2nd and 3rd Petitioners could not be foisted with the liability since they did not fall within the definition of the term "employer" as defined under the said Act.

10. Ms. Bharucha, the learned Counsel appearing on behalf of the Respondents, on the other hand, submitted that the show cause notices which were issued itself contained a clause showing the interest which was payable by the Petitioners under section 7Q of the said Act. She submitted that an undertaking has been given by the Petitioners to the Respondents that no default would be committed in paying the amount which was determined under section 8B and that the entire amount would be paid in 36 installments. She submitted that though the said amount had been paid by the Petitioners, there was admittedly a delay in making payment of the said installments and, as a result, the Petitioners were liable to pay interest for the delayed payment and, as such, they were liable to pay interest under section 7Q of the said Act. She submitted that since the Petitioners had not made payment by close of the financial year, the authorized officer sent a Revenue Recovery Certificate to the Recovery Officer of Regional Provident Fund Office, Bandra adding interest under section 7Q in one case payable by the establishment upto the date of issue of Revenue Recovery Certificate. In

respect of other two periods, the interest under section 7Q was to be calculated on the basis of delayed payments. She submitted that the Income Tax Recovery Rules provided that interest @ 18% should be calculated for the delayed payment but the Respondents have charged interest @ 12%. She submitted that, in fact, the undertaking was given by the Petitioners that, in the event, installments are not paid in time they would abide by the terms and conditions imposed on the Petitioners while accepting the payment by installments.

11. The learned Counsel appearing on behalf of the Respondents further submitted that the assessing authority who had assessed the dues was competent to charge interest. She submitted that since the assessing authority in the Department kept on changing on account of transfer from time to time, an arrangement was made whereby the Recovery Officer also held the post of the Assistant Provident Fund Commissioner who was fully competent to perform the statutory duties and powers are assigned under section 7A of the Act and, therefore, the Recovery Officer in this case was

acting in a duel capacity; one as a Recovery Officer and, secondly, as an Assessing Authority and, consequently, the Recovery Officer was also the Assistant Provident Fund Commissioner who was competent to charge interest under section 7Q of the said Act while simultaneously exercising powers of recovery as prescribed under section 8B and 8G.

12. The learned Counsel appearing on behalf of the Respondents relied on the original show cause notices which were issued in which so far as the first period is concerned interest under section 7Q was added to the total amount though in other two show causes notices in respect of the remaining period, the said interest was not calculated. She was also unable to locate the undertaking which was given by the Petitioners though she invited my attention to the order passed by the Regional Provident Fund Commissioner dated 11/12/1998 in which a condition was imposed, asking the Petitioners to furnish an undertaking that they would pay current dues alongwith other charges

FINDINGS AND CONCLUSION:

13. The short question, therefore, which falls for consideration before this Court is : whether the 3rd Respondent is competent to award interest under section 7Q while executing Recovery Certificate and whether he has power issuing warrant of arrest while exercising his jurisdiction and powers under section 8B of the said Act?

14. In order to appreciate the rival submissions made by the learned Counsel appearing on behalf of both sides, it would be relevant to refer to the relevant provisions of the said Act. “authorised officer” is defined under section 2(aa) as under:-

> “2. Definitions.- .....
> [(aa)“authorised officer” means the Central Provident Fund Commissioner, Additional Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner, or such other officer as may be authorized by the Central Government, by notification in the Official Gazette;]”

"Recovery Officer" is defined under section 2(kb) as under:-

> "2. Definitions.- .....
> (kb) "Recovery Officer" means any officer of the Central Government, State Government or the Board of Trustees constituted under section 5A, who may be authorised by the Central Government, by notification in the Official Gazette, to exercise the powers of a Recovery Officer under this Act;]"

Section 8 of the said Act lays down mode of recovering moneys due from the employers. Section 8A lays down method and manner in which the moneys which are to be recovered by the employers and contractors. Section 8B which is relevant section for the purpose of deciding this case, reads as under:-

> 8B. **Issue of certificate to the Recovery Officer.- (1)** Where any amount is in arrear under section 8, the authorised officer may issue, to the Recovery

Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the modes mentioned below:-

(a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer;

(b) arrest of the employer and his detention in prison;

(c)appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer:

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient for

> recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears."

A perusal of the aforesaid section indicates that under the said clause (2) of section 8B the authorized officer has to issue a certificate under sub-section (1). This power to issue recovery certificate is vested in the authorized officer notwithstanding the fact that the proceedings for recovery of arrears have already commenced through any other mode. The modes for recovery of the amount due are laid down under section 8B sub-clause (1) and more particularly mentioned in clauses (a) to (c) of sub-clause (1). Clause (a) lays down that the amount specified under the certificate can be recovered by attachment and sale of movable or immovable property of the establishment or, as the case may be, the employer. Under clause (b), Recovery Officer can also arrest the employer and detain him in prison and under clause (c) a Receiver can be appointed for the management of the properties of the establishment or the

employer. It has to be noted here that provisions of section 8B cannot be read in isolation and have to be read alongwith the provisions of section 8G. Section 8G specifically incorporates the provisions of the Second and Third Schedule to the Income-tax Act, 1961 and Income-tax (Certificate Proceedings) Rules, 1962 and lays down that it has to be read as a part of provisions of the said section 8G. From a plain perusal of the aforesaid provisions it can be seen that the scheme of the Act and the provisions which are incorporated for the purpose of recovery of dues cannot be read in isolation and have to be read alongwith the provisions of section 8G. These provisions indicate that though the power is vested with the Recovery Officer to recover the dues through the modes of recovery which are mentioned in section 8B(1)(a) to (c), yet, this procedure has to be adopted in consonance with the provisions of section 8G. It is obvious therefore that the Recovery Officer cannot in the first show cause notice resort to all the three modes which are prescribed under section 8B(1)(a) to (c). A close scrutiny of the aforesaid provisions clearly indicate that these are various stages which have to be resorted to by the

Recovery Officer and the degree of coercion which can be exercised legally by the Recovery Officer has to be in a step by step manner. The provisions, therefore, clearly suggest that in the first show cause notice, the Recovery Officer would not be authorized to state that on failure to pay the amount, the employer would be arrested though such power apparently does exist and is vested in him under the provisions of section 8B(1)(a) to (c). It has to be noted here, therefore, that the provisions of Second and Third Schedule of the Income-tax Act and the Rules framed thereunder have been incorporated by the Legislature for a specific purpose and the intention appears to be that instead of reproducing those provisions verbatim in this Act, the provisions under the Income-tax Act have been incorporated in section 8G in a consolidated manner.

15. If the said provisions under Second and Third Schedule of the Income-tax Act are scrutinized, it would reveal that those provisions are more or less identical with the provisions of section 51 of the Civil Procedure Code. It would, therefore, be profitable to see the provisions of

section 51 of the Civil Procedure Code which read as under:-

> "**51. Powers of Court to enforce execution.**- Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-
>
> (a) by delivery of any property specifically decreed;
>
> (b) by attachment and sale or by sale without attachment of any property;
>
> (c) by arrest and detention in prison [for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section];
>
> (d) by appointing a receiver; or
>
> (e) in such other manner as the nature of the relief granted may require:
>
> [Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied-
>
> (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.- In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]"

16. The said provisions, therefore, reveal that only when there is sufficient material available with the Recovery

Officer or Executing Court that the assessee or the judgment debtor in the case of civil suit tries to escape the clutches of law by resorting to unfair means of selling his property clandestinely or surreptitiously or where he fails to pay the decretal amount though he has means to pay that amount, only in such cases the extreme step of arrest of employer has to be resorted to. In the present case, it can be seen that the show cause notice dated 22/12/2004 does not give any such particulars and, in fact, has proceeded to state that in the event of non-payment all the three modes of recovery which are mentioned in section 8B(1)(a) to (c) would be resorted to. In my view, therefore, to that extent, the show cause notice is clearly illegal and is against the provisions of section 8G which incorporates provisions of Second and Third Schedule of the Income-tax Act and Rules framed thereunder. Recovery Officer, therefore, should read those provisions alongwith the provisions of section 8 and 8B of the said Act before issuing the show cause notice. The step of arresting the employer will have to be taken only if contingencies which are mentioned in Second and Third Schedule of the Income-tax Act and the Rules framed

thereunder apply to the employer. In the present case, of course, in view of the directions given by this Court not to arrest the Petitioners, the occasion of arresting the Petitioners has not arisen. However, in future, while issuing the show cause notice to the employer, care may be taken by the Recovery Officer to keep in mind the aforesaid provisions.

17. In the present case, it is an admitted position that the entire amount which was assessed by the authorized officer had been paid by the Petitioners by the end of December, 2002. It is further admitted position which can be seen from the record, more particularly letter which is annexed to the affidavit in reply filed by the Respondents that the Petitioners had, in fact, paid the installments which they had undertaken to pay and also there was a delay in making those payments. Therefore, though the amount which was initially due and payable viz. an amount of Rs 15 lac approximately was paid by the Petitioners, yet, there appears to be some delay in making payment of installments. Though the undertaking given by the

Petitioners is not on record, the letter which is written by the Respondents and which is annexed to the affidavit in reply as Exhibit-1, clearly reveals that certain terms and conditions were imposed on the Petitioners which, obviously, must have been accepted by the Petitioners before they were permitted to pay the said amount in installments. Though the learned Counsel appearing on behalf of the Respondents has shown me one copy of the show cause notice which does indicate that the interest for delayed payment was incorporated in respect of one period and in respect of other two periods the interest was to be calculated, yet, the fact remains that there is nothing on record to show that these show cause notices were received by the Petitioners particularly because the show cause notice which is annexed to the Petition does not disclose the amount of interest for the delayed payment as claimed by the Respondents.

18. Therefore, under the circumstances, in my view, it would be appropriate if fresh show cause notice in respect of the interest which is claimed by the authorized officer is

served on the Petitioners and an opportunity is given to the Petitioners to file their say and after giving hearing to the Petitioners an appropriate order may be passed by the authorized officer in accordance with law. The impugned order dated 03/03/2005, therefore, is set aside and quashed and the Respondent - authorized officer is permitted to issue a show cause notice for the purpose of claiming interest under section 7Q for the delayed payment of installments by the Petitioners. The show cause notice may be issued as per the guidelines which are given by this Court in this judgment and the Petitioners shall be given an opportunity of filing their reply and after giving personal hearing to the Petitioners the concerned authorized officer shall pass a reasoned order. All other contentions raised by the Petitioners and the Respondents are kept open and the concerned authority shall pass a reasoned order in accordance with the provisions of law. The amount which is deposited by the Petitioners in this Court shall be transferred in the account of the Provident Fund Commissioner alongwith interest which is accrued on the said amount. Rule is made absolute in the above terms.

19. Writ Petition is disposed of accordingly.

(V.M. KANADE, J.)